SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1167

CASPER CARROLL GIBSON,

Petitioner,

v.

REX DAVIS, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEPARTMENT OF TREASURY, UNITED STATES CIVIL SERVICE COMMISSION, UNITED STATES OF AMERICA, UNITED STATES POSTAL SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioner Casper Carroll Gibson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 17, 1978.

I. OPINIONS BELOW

The November 17, 1978 opinion of the Court of Appeals, not yet reported, appears in the appendix to this petition. The unreported opinions of the District Court, dated November 5, 1976, and January 4, 1977, and the judgments entered on those opinions the same dates also appear in the appendix.

II. JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 17, 1978. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. QUESTION PRESENTED

Is there any conduct by an agency of the United States government so egregious as

to constitute vexatious conduct and bad faith warranting the payment of attorney fees despite the strictures of 28 U.S.C. § 2412?

IV. STATUTORY PROVISIONS INVOLVED

A. Back Pay Act, 5 U.S.C. § 5596:

"(a) For the purpose of this section, 'agency' means -
(1) an Executive agency;
(2) the Administrative Office of the United States Courts;
(3) the Library of Congress;
(4) the Government Printing Office; and
(5) the government of the District of Columbia.
(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee -
(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to

all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and
(2) for all purposes, is deemed to have performed service for the agency during that period except that -
(A) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Civil Service Commission, and
(B) annual leave credited under subparagraph (A) of this paragraph but unused and still available to the employee under regulations prescribed by the Commission shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees."

B. 28 U.S.C. § 1920:

"A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title.
A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955."

C. 28 U.S.C. § 2412:

"Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of

attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States."

V. STATEMENT OF THE CASE

The complaint commencing this action was filed in the United States District Court for the Southern District of Ohio, Western Division (Dayton) on December 15, 1975. The complaint sought (1) declaratory judgment, mandamus, back pay and injunctive relief as to Petitioner's

rights as a wrongfully discharged Special Agent of the Bureau of Alcohol, Tobacco & Firearms ("ATF"), and (2) an order requiring the United States Postal Service to produce documents under the Freedom of Information Act ("FOIA"). The complaint alleged jurisdiction under 28 U.S.C. §§ 1361, 1331-1332, 2201-2202, 1391(e), and 5 U.S.C. § 552(a).

A. What Lead To The Filing Of This Action.

The events leading to the filing of Petitioner's complaint in the District Court were as follows. On September 24, 1974, Petitioner and another ATF agent, Jerry Johnston, were involved in an altercation in the federal building in Dayton, Ohio which resulted in Petitioner shooting agent Johnston in self-defense, resulting in agent Johnston's death. After a grand jury investigation, Petitioner was not

indicted. In its January 4, 1977 Order in this action (p. 2), the Court recounted these facts and its review of the grand jury evidence and held that Petitioner acted in self-defense:

> "It is this unusual circumstance that enables this Court to possess knowledge of the affair that would not ordinarily be available. The Grand Jury determined, and this Court agrees that Gibson was justified in drawing his firearm; that he fired in self-defense; and that there was not probable cause to indict him for any offense."

Petitioner had told agent Johnston that he (Petitioner) would reveal a mail fraud scheme to which Mr. Johnston was a party. The scheme involved a chain letter which governmental agents and employees were circulating. The participating agents would put their name at the bottom of the letter and send two twenty-five dollar U.S. Savings Bonds to the name at the top

of the letter. They would then pass the letter on to others. Petitioner's statement to Johnston precipitated the altercation and the shooting.

On April 8, 1975, the ATF notified Petitioner of his proposed removal, allegedly because the shooting had "discredited you, brought adverse publicity to you and the Bureau, to the extent that you can no longer successfully carry out the duties and responsibilities of a law enforcement officer." The United States Civil Service Commission reversed the attempted removal of Petitioner in a decision dated July 31, 1975. (This decision and opinion is Exhibit B to Plaintiff's Second Motion for Partial Summary Judgment filed April 16, 1976). ATF immediately attempted to remove Petitioner a second time. After a hearing

before the Civil Service Commission in Cincinnati, Ohio, the Commission again reversed the ATF's removal of Petitioner, in a decision and opinion dated February 5, 1976. (This decision is Exhibit A to the April 16, 1976 Plaintiff's Second Motion for Partial Summary Judgment.) Both times the Civil Service Commission ordered Petitioner restored "to his former position, grade and salary, retroactive to the date of his removal."

After the July 31, 1975 decision of the Civil Service Commission reversing the ATF's first removal attempt, Petitioner filed his complaint in District Court. Both sides moved for summary judgment as to the Freedom of Information Act claim. By an Order and a Judgment filed November 5, 1976 (which appear in the appendix), the District Court held in favor of Petitioner

on his back pay claim and in favor of the government on the Freedom of Information Act claim.

There is a dispute between the parties as to whether Petitioner has ever been paid his full back pay. The government has admitted that Petitioner is owed at least $764.05 back pay (Exhibits A and B to November 29, 1976 Plaintiff's Memorandum on Stipulation of Amount of Back Pay Owed to Plaintiff. These exhibits contain the government's computation of the back pay owed to Mr. Gibson; Petitioner's position is that the back pay owing totals $5,586.94).

The government failed to comply with the orders of the Civil Service Commission that Petitioner be restored to his former position, grade and salary. This is a finding of fact of the court below (November 5,

1976 Order, pp. 2-3), which was not overturned by the Sixth Circuit, although the government argued it was clearly erroneous. The District Court found that the orders of the Civil Service Commission had been disobeyed by the government and ordered the Respondents to comply with those orders and to award Petitioner his back pay under the Back Pay Act, 5 U.S.C. § 5596. (November 5, 1976 Order, p. 2.)

The government appealed to the Sixth Circuit from the District Court's Order that Petitioner be given his back pay. The United States Court of Appeals for the Sixth Circuit held it had insufficient evidence in the record to determine the amount of back pay due Petitioner, and remanded the case to the District Court to conduct a hearing to determine the amount of back pay due Petitioner. The Sixth

Circuit also remanded the case to the District Court to determine whether a statutory exemption to the Freedom of Information Act applies to the documents in this case. Neither the back pay issue nor the Freedom of Information Act issues are before this Court.

In its November 5, 1976 Judgment, the District Court ordered the United States "to pay all back wages, benefits or other compensation presently due the Plaintiff retroactively from the date of this order to April 8, 1975"; further ordered "that the ATF reinstate the Plaintiff in compliance with the orders of the Civil Service Commission": and further ordered "that the defendants show cause why reasonable Attorney fees should not be awarded the Plaintiff."

B. What Lead To The Attorney Fee Award.

In its second Judgment (January 4, 1977), the District Court adjudged "that Plaintiff is hereby awarded the sum of Five Thousand Dollars ($5,000.00) as attorney fees." The award of attorney fees was made after a November 15, 1976 hearing before the District Court at which testimony was taken. The award of attorney fees was made on the following set of facts.

All through the proceedings before the U.S. Civil Service Commission and the courts below Petitioner has maintained that the denial of documents under the FOIA and the wrongful removals by the ATF and harrassment by the government were part of the ATF's attempt to cover up the illegal mail fraud scheme and to stifle Petitioner's attempted disclosure

of this scheme. The harrassment suffered by Petitioner is detailed in the findings of fact of the District Court in its January 4, 1977 Order awarding Petitioner $5,000.00 attorneys fees on the ground that the conduct of the government was "oppressive, vexatious and in bad faith." (pp. 5-6 of that Order.)

The issue before this Court is the same as that phrased by the District Court at p. 3 of its January 4, 1977 Order (Def. App. 9):[1/]

> "Is there any conduct by an agency of the United States government so egregious as to constitute vexatious conduct and bad faith warranting the payment of attorney fees despite the strictures of 28 U.S.C. § 2412?"

1/"Def. App." refers to the appendix filed by Respondents in the Sixth Circuit, called the Defendants' Appendix.

In the Sixth Circuit, the Respondents agreed with this formulation of the issue, Appellee's Brief 11-12. More specifically, the question presented to this Court is whether, in the context of the facts of this case and in light of the District Court's findings of facts that the "conduct of the ATF, its employees and officials, can only be described as oppressive, vexatious and in bad faith," and that "Gibson has been harrassed and hounded from his job while a law enforcement agency of the United States, with bland indifference to the consequences of its action, has for all practical purposes terminated the employability of one of its former agents," (January 4, 1977 Order pp. 4-6, found at Def. App. 10-12), attorney fees were properly awarded by the District Court.

ATF did a number of things to Plaintiff

which the lower court found constituted vexatious, bad faith conduct. Even ignoring the two removal attempts by ATF, both of which were set aside by the United States Civil Service Commission, the transfers of Petitioner among various job locations, the bad job references (Def. App. 50), and the failure to promptly reinstate Petitioner and to promptly pay Petitioner his back pay as ordered by the Civil Service Commission (and as required by the Back Pay Act, 5 U.S.C. § 5596) constitute bad faith conduct. Much of the harrassment of Petitioner is detailed in Plaintiff's Affidavit of November 16, 1976, found at Def. App. 43-50, and in the record of the hearing before Honorable Carl B. Rubin held November 15, 1976. At that hearing, the ATF presented a witness who failed to justify any of the ATF's conduct. The 99-page transcript of that hearing contained

the explanations of the witness and of Mr. Chevrier, of the office of Chief Council of the ATF, who had investigated the matter and unsuccessfully attempted to assure the District Court that the agency had acted in good faith.

The November 15, 1976 hearing transcript shows the cause of ATF's vengeance. The court stated, at R. 28-29:

> "The Court: Except for the fact this Court has personal knowledge of the situation here, Mr. Chevrier. I have a feeling maybe you don't have. There is constantly in the background of this case an aura of the ATF having great concern over something that might or might not have been going on in Dayton, and there is the feeling that I can't escape that Gibson, by making this fact public, so disturbed the ATF that they were going to get him, and I am referring to the possibility that there was going on in this office, number one, a chain letter scheme and, number two, there has also been in the background a question of whether or not there was a proper disposal of confiscated weapons. I am not

> ruling on either of these situations. I am merely saying that Gibson made both of those facts public, and there is reason to believe that that is what caused his trouble, not because he had an altercation with another agent.
>
> Mr. Chevrier: Your Honor, that assertion has been on the periphery of this case." (Emphasis added.)

The court also stated that the harrassment of Petitioner was subtle but effective, R. 22-23:

> "The Court: Well, that is the position you take, and I have to weigh this in the total context of this case, and you see, I keep coming back to the feeling I have that it doesn't take much talent in any government bureau to consign someone to Siberia. It doesn't take much talent at all. You can harrass a person. You have a thousand ways of doing it, and I keep having the uneasy feeling that this wasn't just coincidence. A man is removed once, and there is a procedural error. Then he is removed a second time, and then it develops he shouldn't have been removed in the first place, and then it takes seven months for that check to be paid to him."

See also R. 20-21 as to the government's admission that Mr. Gibson should have promptly received his back pay after the ruling of the Civil Service Commission, and the government's failure to adequately respond to the court's question as to why Mr. Gibson did not receive that money.

Finally, the lower court was never informed as to why the government had represented to that court in June, 1976, that all back pay had been paid to Mr. Gibson. R. 31, 52. The court was so informed by the United States Attorney. The court wanted to know, "for what purpose was the Court misled?" This question was never answered.

1. Defendants Defied The First Civil Service Reinstatement Offer.

The reinstatement order of July 31, 1975 (Def. App. 18-24) ordered that Petitioner

be restored "to his former position, grade and salary effective to the effective date of the removal," Civil Service Commission Decision of July 31, 1975, at 6 (Def. App. 24). It also ordered that Petitioner be restored with full back pay. (Def. App. 76.) Nevertheless, Petitioner never received full back pay for the time period following his first removal.

The District Court also ordered that Petitioner be paid retroactively to April 8, 1975. November 5, 1976 Order at 2-3 (Pl. App. 61a-62a; Def. App. 3-4). Nevertheless, Respondents have refused to pay Petitioner the full amount of his compensation from this first removal date. January 4, 1977 Order at 2 (Def. App. 8). As the District Court noted at the November hearing: "I consider restoration to include the payment of those wages he should have received."

R. 91. Respondents have paid Petitioner nothing for the time period of the first removal, stating that Mr. Gibson chose to be placed on a "leave without pay" status. Such refusal to pay full back wages is in total disregard of the orders of both the Civil Service Commission and the District Court.

The government relies heavily on the fact that Mr. Gibson was in a leave without pay status during the second removal attempt. However, at the November 15, 1976 hearing the ATF admitted that Mr. Gibson was faced with the loss of his income unless he remained in a leave without pay status, R. 41-46; see especially R. 41-42:

> "The Court: Excuse me. This is a meeting in late August?
> The Witness: August of 1975, yes, sir.
> The Court: And he was advised he could be restored?
> The Witness: Yes, sir.

> The Court: You didn't advise him that there was going to be a second attempt at removal?
> The Witness: Oh, yes, I will continue with that.
> The Court: So, that was really rather meaningless.
> The Witness: That's right.
> The Court: Excuse me. That is rather meaningless. If you say to the man, well, we will restore you to Dayton but we are going to remove you almost immediately, isn't that the ultimate of what you said?
> The Witness: Yes, sir. What was said was that he would be restored in compliance with the Commission order, and since the Federal Employees Appeal Authority had not reversed the agency on merit, the agency expected to proceed with a second removal action.
> The Court: Well, this is really not a restoration, is it? Isn't this rather sort of a musical chair sort of thing? We are going to let you go back to Dayton, but five minutes after you get there, we are going to remove you once again. Isn't that the reality of it?
> The Witness: Except that you follow the complete procedures, sir. You have to give him a notice.
> The Court: Miss Fisher, I am concerned here with some realities because there is only one question before me, and that is whether or not the conduct of ATF warrants the payment of attorney fees. I am not

> concerned with the dollars. That I say again is a mathematical computation, so when somebody says well, you can be restored back to Dayton but don't sit down because before you do we are going to remove you, that is not restoration as a matter of fact."

The bad faith was evidenced by the intent behind ATF's two removal attempts and the continual refusal to pay back wages. The ATF was not entitled to disregard the orders of the Civil Service Commission or the District Court to pay back wages.

2. Defendants Defied The Second Civil Service Reinstatement Order.

Respondents insist that they made full payment of back wages to Petitioner following his second dismissal pursuant to the Civil Service Commission Order of February 2, 1976 (Def. App. 28-36). Even if this is true, the fact remains that it took seven months for that back-pay check to arrive.

January 4, 1977 Order at 3 (Def. App. 9). Even though a payment was made, the District Court found the delay prior to payment as further evidence of ATF's vexatious conduct. Transcript of November 15, 1976 hearing, R. 5-7.

No matter how the figures are manipulated by Respondents the full amount owed Petitioner for back wages has not been paid. In fact, the proposed stipulation by Respondents concerning back pay from October 25, 1975 demonstrates that full back pay has not been awarded pursuant to the second Civil Service Commission Order. (Def. App. 82-87.)

3. Plaintiff Was Harrassed Following The Shooting Incident.

The District Court found that ATF made a concerted attempt "to deal with [Mr.] Gibson in such a fashion that he would in fact resign from his position [,] and that has

occurred." January 4, 1977 Order at 3 (Def. App. 9). In reaching this determination the District Court took into account relevant facts not before this Court: the grand jury proceedings were reviewed in detail by the District Court and placed under seal by the District Court. January 4, 1977 Order pp. 1-2. (Def. App. 15.) The determination below was not clearly erroneous based upon all facts before the District Court. The Sixth Circuit did not hold those facts to be clearly erroneous.

The United States Court of Appeals for the Sixth Circuit reversed the judgment of the District Court insofar as it awarded attorney fees against the United States, holding that such an award was prohibited by 28 U.S.C. § 2412, and that in the absence of a statute attorney fees

may not be recovered against the United States for vexatious, bad faith conduct on the part of its agencies or officials.

VI. REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals for the Sixth Circuit reversing the award of $5,000.00 attorney fees should be reviewed and reversed because (1) this is a case of first impression, squarely presenting the issue whether there is any conduct on the part of the United States (acting through its agencies and officials) so outrageous that an award of attorney fees may be made by the District Court; (2) it permits federal officials and agencies to act toward their employees such as Petitioner (or indeed toward any citizen) with impunity, knowing that the courts are powerless to swiftly redress their violations or

evasions of orders of administrative agencies; (3) it necessarily denies the existence of an inherent, equitable power in the federal courts to award attorney fees when a court finds itself faced with bad faith, vexatious conduct on the part of the government.

This is a case of first impression because it is the first case in which findings of bad faith, vexatious conduct by the government have been made by a District Court, which then awarded attorney fees against the government. There are cases denying attorney fees to litigants who have prevailed against the government. Those cases do not involve bad faith conduct. There are cases imposing attorney fees on a private party for bad faith conduct. There are no cases like the instant one.

It is significant that this case arises based upon findings of fact of the District Court, made after a hearing at which the District Court saw and heard testimony by a government witness, that (1) the government failed to comply with the orders of the United States Civil Service Commission that Petitioner be restored to his former position, grade and salary; and (2) that the government's actions constituted bad faith, vexatious conduct.

Thus the Court found at p. 3 of its January 4, 1977 Order that: "There is evidence, and this Court so finds, that a deliberate effort was made by the Alcohol, Tobacco and Firearms Unit to deal with Gibson in such a fashion that he would in fact resign from his position and that has occurred." The District Court further found at p. 4 of that January 4, 1977

Order that the harrassment of Petitioner by the ATF was oppressive, vexatious, and in bad faith:

> "Were the defendant in this case a private corporation which had so dealt with an employee, there would be no doubt that the conduct was oppressive and vexatious and in bad faith. The legendary power of an employer to send a disliked employee to 'Siberia' is illustrated here in almost a classical context. Gibson, whose sole offense, apparently, was saving his own life after an altercation and a threat to disclose irregular and possibly illegal activities of other agents, [footnote omitted] was not commended for so doing. Instead, Gibson has been harrassed and hounded from his job while a law enforcement agency of the United States, with bland indifference to the consequences of its action, has for all practical purposes terminated the employability of one of its former agents." (Emphasis added.)

Therefore the Court concluded that: "The conduct of the ATF, its employees and officials, can only be described as oppressive, vexatious and in bad faith.

This Court holds that it is of such a nature as to warrant the imposition of attorney fees." January 4, 1977 Order, pp. 5-6.

If ever there was or will be a case for the award of attorney fees based upon bad faith, vexatious conduct of the government, this is that case. In the face of these findings of fact of the District Court, the government's position is, as expressed in its Brief For The Appellee-Cross Appellants at p. 19 before the United States Court of Appeals for the Sixth Circuit: "Under no circumstances can a court exercise any kind of equitable power to award attorneys' fees against the United States."

Simply put, Petitioner's argument is that the federal courts have the inherent, equitable power to award attorney fees when a court finds itself faced with bad faith,

vexatious conduct. This power is analogous to the contempt power. Apparently it has never been tested against the United States, since the reported cases do not deal with findings of fact of bad faith on the part of the government. Yet because of the importance of the judiciary's duty to correct wrongs done to citizens (January 4, 1977 Order, pp. 4-5; Marbury v. Madison, 1 Cranch 137, 166, 2 L.Ed. 60, 70 (1803)) the existence of the power should be upheld.

This power is similar to the Court's contempt power. "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." Shillitani v. United States, 384 U.S. 364, 370 (1966). This is an inherent power of the courts, Ex parte Robinson, 19 Wall. 505, 510, 22 L.Ed. 205, 207 (1874):

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." (Emphasis added.)

Accord: In re Nevitt, 117 F.2d 448, 455 (8th Cir. 1902), another leading case.

This Court has held that the United States may prosecute an action for contempt because "Article 3, § 2, of the Constitution, expressly contemplates the United States as a party to civil proceedings by extending the jurisdiction of the Federal judiciary 'to Controversies to which the United States shall be a party.'" McCrone v. United States, 307 U.S. 61, 63 (1939), approved in United States v. U.M.W., 330

U.S. 258, 302 (1947). If the government is able to prosecute a contempt action and will not be denied "the civil remedies enjoyed by other litigants," 330 U.S. at 302, then it should also be held subject to the courts' inherent powers to control contumacious behavior.

Here the contumacious behavior was by the ATF, a government agency. To permit federal agencies to ignore federal statutes, orders of the Civil Service Commission, and orders of the district courts would be unjust.

Attorney fees may be awarded for civil contempt, Fleischmann v. Maier Brewing Co., 386 U.S. 714, 718 (1967); N.L.R.B. v. Local 825, I.U.O.E., 430 F.2d 1225, 1229 (3d Cir. 1970), rejecting the argument that such an award is punitive and therefore improper; Folk v. Wallace Business Forms, Inc., 394

F.2d 240, 244 (4th Cir. 1968). They should likewise be awarded for violation of the court's inherent equitable power to remedy bad faith, vexatious conduct, and "great reliance must be placed upon the discretion of the trial judge." United States v. U.M.W., supra, 330 U.S. at 303.

Attorney fees may be awarded to the prevailing party when an opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974). Accord: Hall v. Cole, 412 U.S. 1, 5 (1973), referring to the courts' "inherent equitable power" to award attorney fees; United States v. Ford Motor Co., 522 F.2d 962, 967 (6th Cir. 1975); Milburn v. Huecker, 500 F.2d 1279, 1282 (6th Cir. 1974).

Alyeska Pipe Line Service Co. v. Wilderness Society, 421 U.S. 240 (1975) did not eliminate the "bad faith" exception to the "American Rule"[2/] even though it held that attorney fees cannot be awarded to a party acting as a private attorney general. 421 U.S. at 258-259. The "bad faith" exception to the "American Rule" is still viable even after Alyeska. International Association of Machinists & Aerospace Workers Lodge No. 1194 v. Sargent Industries, 522 F.2d 280, 284 (6th Cir. 1975). Accord: Lamb v. Sallee, 417 F. Supp. 282, 288 (E.D. Ky. 1976) Clemons v. Runck, 402 F. Supp. 863,

2/The so-called "American Rule" is that there is no award of attorney fees in favor of the prevailing party in a civil action. 421 U.S. at 247. Two exceptions to this rule following Alyeska are: (1) bad faith on the part of the opponent, and (2) the preservation of recovery of a common fund out of which a number of individuals will benefit.

870 (S.D. Ohio 1975). The District Court had this fact in mind when it considered this issue, for it stated that Alyeska "very clearly left [the] area of vexatious conduct alone, and if it is determined that conduct is vexatious, attorney fees may be awarded." Transcript of November 15, 1976 hearing, p. 82.

This is a unique case in that attorney fees were awarded against the government after findings of fact were made concerning its bad faith. Only a few cases touch upon this issue. TOOR v. HUD, 406 F. Supp. 960 (N.D. Cal. 1975) held that the court's equitable powers permitted it to award attorney fees against the government for bad faith, vexatious actions. 406 F. Supp. at 964, 967. The court found the defendants' actions were not sufficiently vexatious to support an award of fees.

Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974) found that the government had been "uncooperative and defiant" and that this "unreasonably defiant conduct" forced the plaintiffs to hire attorneys and accountants to prevent the Office of Economic Opportunity from continuing to withhold funds previously granted. This conduct was found to be "reason enough, standing alone, to justify an awarding of attorneys' and accountants' fees" against H.U.D., 386 F. Supp. at 1193-1194. The Red School House court would certainly have approved the statement by the District Court in the case at bar that [t]his court is unwilling to subscribe to the concept that there is no conduct, under any circumstances, however vicious or oppressive, by a government agency

which is beyond the power of a court in the exercise of its equity powers to rectify." January 4, 1977 Order, p. 5 (Def. App. 11).

In Adams v. Carlson, 521 F.2d 168 (7th Cir. 1975), a suit brought against the Director of the Federal Bureau of Prisons challenging certain policies and procedures at a federal institution, the court stated that attorney fees could be awarded against the government if it acted in bad faith:

> "We are not unmindful, however, that 'a federal Court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'' . . . Hall v. Cole, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973)." 521 F.2d at 170.

No attorney fees were awarded in that case because the question of bad faith had not been raised in the lower court. In the case at bar, however, the issue of bad

faith was raised in the District Court, and that court determined that the government's actions were "oppressive, vexatious, and in bad faith." January 4, 1977 Order, pp. 5-6 (Def. App. 11-12).

The government argues that the attorney fee award is banned by 28 U.S.C. § 2412, which only prohibits an award of attorney fees against the United States when such fees are part of the ordinary costs under 28 U.S.C. § 1920. However, Alyeska did not rule on the validity of the lower court's construction of § 2412 because there was no cross-petition on that issue. 421 U.S. at 287 (Marshall, J., dissenting). Justice Marshall wrote that attorney fees can be properly awarded against the United States and that § 2412 only prohibits an award of "costs" which includes attorney fees, 421 U.S. at 287 n. 9. The legislative

history and relevant cases support this view.

Mr. Justice Marshall's views are fully borne out by the legislative history of 28 U.S.C. § 2412, as well as cases which have interpreted the meaning of "costs".

The Senate Report which accompanied the 1966 amendment to 28 U.S.C. § 2412 (P.L. 89-507) pointed out that the costs referred to in that statute were limited to those "listed in section 1920 of title 28, United States Code, and include fees of the clerk and the marshall, necessary transcripts, printing, and docket fees." S. Rep. No. 1329, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2527, 2529.

28 U.S.C. § 2412 refers specifically to those costs delineated in 28 U.S.C. § 1920. The Supreme Court noted the difference

between ordinary costs, such as those listed in 28 U.S.C. § 1920, and attorney fees nearly fifty years ago in People of Sioux County v. National Surety Co., 276 U.S. 238 (1928), which held that a state statute which included attorney fees as "costs" did not authorize a federal court to include those fees as part of the ordinary costs awarded to the prevailing party, since "costs" and attorney fees are two distinct things:

> "That the [state] statute directs the allowance, [of attorneys' fees] to be added to the judgment as costs . . . does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like . . .." 276 U.S. at 243-244.

This view was reiterated in United States v. Equitable Life Assurance Society, 384 U.S. 323, 330 (1966), where Sioux County was cited for the proposition that "the

distinction between costs and allowances for attorneys' fees is well recognized."

In this case Petitioner's right to full back pay and allowances was unlawfully frustrated by the Respondent's actions. This is a finding of fact in the November 5, 1976 Order of the District Court. The Back Pay Act, 5 U.S.C. § 5596, is a "broad remedy for improper" removals and entitled Mr. Gibson to "full back pay for the time he was out of work," Sampson v. Murray, 415 U.S. 61, 82 (1974). United States v. Testan, 424 U.S. 392, 406 (1976) stated that Congress provided "in the Back Pay Act for the award of money damages for a wrongful deprivation of pay." Here the United States Civil Service Commission twiced ordered Petitioner restored to the ATF "to his former position, grade and salary" within thirty days from receipt

of the decision by the ATF. The District Court in its November 5, 1976 Judgment ordered "that the ATF reinstate the Plaintiff in compliance with the orders of the Civil Service Commission." In its subsequent January 4, 1977 Order at pp. 2-3, the District Court found that the Civil Service Commission orders and its order for reinstatement were not obeyed.

The cost to Petitioner of prosecuting his federal court action to obtain these rights eliminated all benefits of the Back Pay Act and the orders of the Commission. The congressional purpose behind 5 U.S.C. § 5596 was thwarted. Unless the award of attorney fees is upheld by this Court, an egregious wrong will go uncorrected. After saying "I think the activities of the ATF in this case are reprehensible, unbelievably

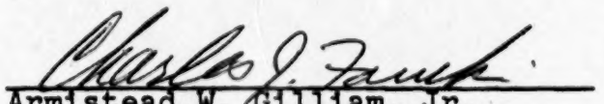
reprehensible," the District Judge said "the net result is this man who in my opinion has been harrassed for a year and a half is just now because of the intervention of this Court getting what he was entitled to get a long time ago." Transcript of November 15, 1976 hearing, p. 19. "He shouldn't be required to come to this Court and ask for relief, but the fact is he couldn't have received it without the intervention of this Court. MR. CHEVRIER: Well, I am not prepared to argue that, and even if I were, I wouldn't." Transcript of November 15, 1976 hearing, p. 21.

In the District Court, in the Sixth Circuit Court of Appeals, and before this Court, counsel for Petitioner have represented Petitioner without charging Petitioner fees, and will continue to do so. Cases like the instant one are unlikely

to reach the attention of this Court or even of the lower courts since protracted federal litigation for free is not a common part of most attorneys' private practices.

It is inevitable that this Court will pass on the issue presented by the instant case because the District Courts will surely find occasions to exercise their inherent equitable powers to award attorney fees. A writ of certiorari should be granted.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASPER CARROLL GIBSON,

Plaintiff,

v.

Civil No.
C-3-75-316

REX DAVIS, DIRECTOR, Bureau of Alcohol, Tobacco, and Firearms, Department of Treasury, et al.,

Defendant.

O R D E R

This matter is before the Court upon the motions of both parties for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This action stems from a tragic incident which occurred in the United States Post Office and Courthouse in Dayton, Ohio, on September 24, 1974. On that date two agents of the Bureau of

Alcohol, Tobacco and Firearms (ATF), plaintiff and Special Agent Jerry D. Johnston, became engaged in an altercation. Johnston drew his gun and threatened to kill Gibson. Several shots were fired resulting in one of Gibson's fingers being blown off and Johnston being fatally wounded. A Grand Jury made a complete investigation of the incident and declined to indict Gibson.

The first of plaintiff's causes of action, brought under the Back Pay Act, 5 U.S.C. § 5596, involves two separate removals from his position as a special agent by the ATF. Gibson was first removed on April 8, 1975, based upon the killing of Johnston and the adverse publicity to the Bureau.

On July 31, 1975, the Civil Service Commission found the removal fatally defective as lacking any specificity.

The ATF was ordered to restore Gibson to his former position, grade, and salary, retroactive to the date of his removal. Plaintiff was not restored. The ATF refused to comply and advised that Gibson would be removed upon return to his position. Under such circumstances, the plaintiff was given little choice but to remain in the status of on leave without pay.

On October 24, 1975, Gibson was again removed from the ATF for the same reasons stated in the first removal. On February 2, 1976, the Civil Service Commission once again reversed the ATF's decision and once again ordered that Gibson be restored to his former position, grade, and salary. The ATF was given thirty (30) days to comply with the Commission's decision. To date this order also has not been complied with.

The United States has offered neither citations of authorities nor evidentiary materials in opposition to plaintiff's motion. We do not believe that plaintiff waived his right to back pay by accepting disability benefits or by opting for a leave-without-pay status.

The Back Pay Act affords relief for "an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee . . .". (sic) We read this language as requiring that a wrongfully removed employee be made whole, i.e., lost compensation less any payment already received. The fact that the Act may have contemplated a single removal rather than the multiple removals present here, is no bar to an award of all damages incurred by the employee. As the

Supreme Court noted in Sampson v. Murray, 415 U.S. 61, 82 (1974), "plaintiff is eligible for full compensation for any period of improper discharge under this Section." Accordingly, the United States of America is hereby ORDERED to pay all back wages, benefits, or other compensation presently due the plaintiff retroactively from the date of this Order to April 8, 1975. IT IS FURTHER ORDERED that the ATF reinstate the plaintiff in compliance with the orders of the Civil Service Commission.

Plaintiff's second cause of action is the subject of defendant's motion for summary judgment, filed March 12, 1976. Soon after Johnston's death, the United States Postal Service commenced an investigation of a chain letter scheme involving officers of the ATF. Plaintiff alleges that he told his superiors of this scheme prior to the

September 24th incident, but they failed to investigate the situation. He alleges that the ATF desired to avoid adverse publicity from its illegal activity by its agents and that this was the prime reason for his dismissal.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b), he sought to obtain all the documents, statements and memoranda generated by the Postal Inspector's investigation into this matter. Plaintiff has already received copies of some of these materials, but such copies contain substantial deletions. The United States has refused to provide unexpurgated copies, alleging that such materials constitute investigatory records complied (sic) for law enforcement purposes and are thus exempt from disclosure under 39 U.S.C. § 410(c)(6) and 5 U.S.C. § 552(b)(3).

The unqualified exemption of investigatory materials under 39 U.S.C. § 410(c)(6) is comparable to the exemption set forth in 5 U.S.C. § 552(b)(7) before it was narrowed by amendment in 1974. Had Congress meant to narrow 39 U.S.C. § 410(c)(6) as well, it would have done so. Our perusal of the documents already afforded plaintiff as well as the affidavit of C. Neil Benson, Chief Postal Inspector, leads to the conclusion that these materials fall within the sweep of 39 U.S.C. § 410(c)(6). Institute for Weight Control, Inc. v. Klassen, 348 F. Supp. 1304 (D.N.J. 1972), affirmed 474 F.2d 1338 (3d Cir. 1973); Administrator, Federal Aviation Administration v. Robertson - U.S. -, 95 S.Ct. 2140 (1975). Plaintiff alleges that by releasing parts of these files the Postal Service waived the protection of 39 U.S.C. § 410(c)(6).

Such voluntary disclosure has no bearing on whether or not the agency is required by law to disclose the materials in question. Sears, Roebuck & Co. v. General Services Administration, 384 F. Supp. 996 (D.D.C. 1974), affirmed 509 F.2d 527 (D.C. Cir. 1974). Accordingly, defendant's motion for summary judgment is hereby GRANTED.

The Court notes with concern ATF's recalcitrant conduct in this matter and defiance of orderly administrative procedures. Such conduct by an enforcement agency of the United States has implications far beyond the limits of this case. It may well be that it has reached the level of bad faith and vexatiousness justifying an award of attorney fees to the plaintiff. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, (1975); U.S. v. Ford Motor Co., 522 F.2d 962, 967 (6th Cir.

1975); Smoot v. Fox, 353 F.2d 830, 832 (6th Cir. 1965). Accordingly, defendant is hereby ordered to show cause why reasonable attorney fees should not be awarded the plaintiff in this matter. A hearing on this question will be held November 15, 1976, at 9:00 a.m.

IT IS SO ORDERED.

Carl B. Rubin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASPER CARROLL GIBSON,

Plaintiff,

v.

Civil No.
C-3-75-316

REX DAVIS, Director
Bureau of Alcohol, Tobacco
and Firearms, Department of
Treasury, et al.,

Defendants.

O R D E R

This matter is before the Court for consideration of the award of reasonable attorney fees to counsel for the plaintiff. Pursuant to direction of the Court, a hearing to show cause why reasonable attorney fees should not be awarded was held on November 15, 1976, during which time counsel for the defendant was heard and given an

opportunity to submit a memorandum of law.

The matter therefore is before the Court not only upon the oral argument, but upon memoranda, affidavits and extraordinary knowledge of this Court derived from a matter entitled "The United States of America v. Casper Carroll Gibson, No. M-3-74-289."

The circumstances of this matter are sufficiently unusual to warrant a detailed recitation.

Prior to September 24, 1974, plaintiff Casper Carroll Gibson and Jerry D. Johnston were both agents of the Bureau of Alcohol, Tobacco and Firearms, assigned to Dayton, Ohio. On that date an altercation occurred between the two named individuals and both agents drew their guns. Gibson was wounded to the extent of the loss of his ring

finger of his left hand and Johnston was fatally wounded.

The matter was referred to a Grand Jury and a careful and exhaustive inquiry was conducted. At the conclusion of such inquiry the Grand Jury requested that this Court review its finding. As a result thereof this Court did read 621 pages of transcript and did examine 110 items of evidence. At the conclusion of its examination, the Court issued an Order attached hereto and marked Exhibit A. It is this unusual circumstance that enables this Court to possess knowledge of the affair that would not ordinarily be available. The Grand Jury determined, and this Court agrees, that Gibson was justified in drawing his firearm; that he fired in self-defense; and that there was not probable cause to indict him for any offense. The

Bureau of Alcohol, Tobacco and Firearms, however, determined that Gibson should be removed because of the killing of Johnston and because of the "adverse publicity to the Bureau" that resulted therefrom. On April 8, 1975, Gibson was so removed.

It may be noted in passing that the altercation between Gibson and Johnston concerned the existence of a chain letter scheme in which agents of the ATF, including Johnston, participated and an inquiry regarding the appropriate disposal of confiscated weapons. There was and is reason to believe that agents of the ATF other than Gibson violated Bureau policy in these two regards and may have committed indictable offenses. On April 8, 1975, Gibson was informed of his removal. An appeal from that decision was filed and on July 31, 1975, the Civil Service Commission found that the removal of

Gibson was "fatally defective because it lacked specificity and detail." The ATF was ordered to restore Gibson to his former position, grade and salary. The ATF did not.

Gibson, who had been on a "leave without pay" status and compensated by the Bureau of Employee Compensation due to his injury, elected to remain on such status rather than be returned and immediately discharged again by the ATF. On September 16, 1975, the ATF by letter proposed to remove him once again. The grounds for removal were in effect identical to those previously used, but couched in different terms. The underlying basis for such removal was the killing of agent Johnston and the public knowledge thereof.

On February 5, 1976, the Civil Service Commission once again reversed the discharge and ordered him restored to his

former position, grade and salary. Mr. Gibson was reinstated by the ATF on approximately March 6, 1976, and the balance of back pay owed to Gibson in the amount of $738.50 was ultimately paid to him on October 4, 1976, a period of approximately seven months.

After his return, between March 8, 1976, and June 3, 1976, Gibson was assigned for duty in Cincinnati, Ohio; Charleston, West Virginia; Glyncoe, Georgia; Dayton, Ohio; Cleveland, Ohio and Detroit, Michigan. Evidence of harrassment and unfair treatment by his superiors is noted in his affidavit dated June 16, 1976 (Doc. 15). There is evidence, and this Court so finds, that a deliberate effort was made by the Alcohol, Tobacco and Firearms Unit to deal with Gibson in such a fashion that he would

in fact resign from his position and that has occurred.

The matter presents two questions to the Court:

Question No. 1: Is there any conduct by an agency of the United States government so egregious as to constitute vexatious conduct and bad faith warranting the payment of attorney fees despite the strictures of 28 U.S.C. § 2412?1

Question No. 2: If such a situation can exist, does the factual background of this case warrant such imposition?

The circumstances under which attorney fees may be awarded has been exhaustively treated by the Supreme Court of the United States in Aleyeska (sic) Pipeline Service

1/(a) The United States shall be liable for the fees and costs only when such liability is expressly provided for by an Act of Congress . . .

Co. v. Wilderness Society, 421 U.S. 240 (1975). The Aleyeska (sic) case carved out an exception to the "American rule" where there is evidence of bad faith, vexatious, wanton or oppressive conduct. The Supreme Court specifically held that a federal court in the exercise of its equitable powers may award such fees when the interests of justice so require.

Were the defendant in this case a private corporation which had so dealt with an employee, there would be no doubt that the conduct was oppressive and vexatious and in bad faith. The legendary power of an employer to send a disliked employee to "Siberia" is illustrated here in almost a classical context. Gibson, whose sole offense, apparently, was saving his own life after an altercation and a threat to disclose irregular and possibly illegal

activities of other agents,[2/] was not commended for so doing. Instead, Gibson has been harrassed and hounded from his job while a law enforcement agency of the United States, with bland indifference to the consequences of its action, has for all practical purposes terminated the employability of one of its former agents.

Where do the Carroll Gibsons of this world turn for redress of their wrongs? Presumably, the United States District Court is the vindicator of such wrongs but it is a fact of our present day existence that the doors of such court are effectively closed unless one has the assistance of well-trained and competent

2/A statement in open court by plaintiff's counsel that twenty agents were reprimanded for participation in a chain letter scheme was not challenged by defendant.

counsel. The rights of government employees, as well as the rights of citizens, against a hostile and vindictive government should not be limited to the availability of public minded attorneys willing to expend the time and effort necessary for proper representation without any hope of compensation.

The burden of equitable dealings cannot be shifted to the legal profession, however dedicated its practitioners may be. Representation without compensation may, in fact, result in no representation at all. We deal with realities and the realities are that attorneys are entitled to be compensated. If we deny this reality, we do in the immortal words of Dombrowski "chill" the assertion of basic rights. Dombrowski v. Pfister, 380 U.S. 479 (1965).

The award of attorney fees must not be confused with the notion of punitive or exemplary damages. It is not practical to punish the ATF nor those responsible for this matter, since such responsibility is diffused among a large number of individuals. An award of damages against an agency would be neither a punishment for the individual actions nor a deterrent to others.

The concept instead should be the encouragement of righting a wrong and the appropriate compensation of an attorney at law who is prepared to demonstrate such wrong. Just compensation for his efforts may well encourage other attorneys to perform similar functions and perhaps then the next federal agency that seeks to harrass an employee will not look upon him as helpless and without a champion.

To assert that this is a legislative function and not a judicial one is to deny in reality the very purpose of a court of equity. Thomas Jefferson once wrote that there must be "equal and exact justice to all men of whatever state or persuasion, religious or political." This is a duty enjoined upon the judiciary. It is neither a legislative function nor an executive function. This Court is unwilling to subscribe to the concept that there is no conduct under any circumstances, however vicious or oppressive, by a government agency which is beyond the power of a court in the exercise of its equity powers to rectify. Question No. 1, therefore, must be answered in the affirmative.

The mere recitation of the background of this case is answer enough to Question No. 2. The conduct of the ATF, its employees

and officials, can only be described as oppressive, vexatious and in bad faith. This Court holds that it is of such a nature as to warrant the imposition of attorney fees. Accordingly, plaintiff is hereby awarded the sum of Five Thousand Dollars ($5,000.00) as attorney fees.

IT IS SO ORDERED.

Carl B. Rubin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: Grand Jury Proceedings

Misc. No. MS-3-74-14

This matter is before the Court under the following circumstances: On September 23, 1974 at approximately 5:10 p.m. Jerry D. Johnson, (sic) Special Agent of the Bureau of Alcohol, Tobacco and Firearms was shot and killed in Room 308 of the Federal Building, Dayton, Ohio. At the same time and place Casper C. Gibson, Special Agent of the Bureau of Alcohol, Tobacco and Firearms, was shot in the ring finger of his left hand.

EXHIBIT A

A Grand Jury previously empaneled in the Southern District of Ohio, Western Division, considered the above facts on November 5, 6, 7, 8, 11 and 12, 1974, and reported to this Court on November 12, 1974, its determination to return no indictment. Both the Grand Jury and the United States Attorney for the Southern District of Ohio requested that the Court review the evidence presented to it.

The foregoing request of the Grand Jury and of the United States Attorney is an unusual one. It is neither the function of the United States District Court to review actions of a duly empaneled Grand Jury, nor to substitute its judgment for that of such Grand Jury. The circumstances herein are equally unusual. Two agents of the Bureau of Alcohol, Tobacco and Firearms, an enforcement agency of the United States

of America, engaged in an altercation on federal property with the result that one was killed and the other was wounded. This is more than an ordinary homicide and it warranted the most careful consideration. Because of the foregoing this Court agreed to the request.

The transcript of proceedings before the Grand Jury totaled 619 pages. It reflected 47 hours of consideration. Thirty witnesses were summoned and testified regarding investigatory participation of the following agencies: Dayton Police Department, Dayton Fire Department, Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms, Miami Valley Regional Crime Laboratory, Office of the Coroner of Montgomery County, Ohio, Office of the Postal Inspector, United States Post Office. In addition, testimony was

received from a Deputy United States Marshal, a United States Magistrate for the Southern District of Ohio, Western Division, an Assistant United States Attorney, and a member of the Probation Department of the United States District Court, Southern District of Ohio, Western Division, each of whom had some knowledge of the occurrence.

No person mentioned by any of thirty witnesses as possessing any pertinent information was overlooked. No scientific test or investigative procedure suggested by any witness or by the Grand Jury was not performed.

110 exhibits were prepared and submitted to the Grand Jury for its consideration. An exhaustive, meticulous and thorough investigation was conducted; a detailed, precise and full presentation was made to

the Grand Jury. The investigative agencies, the office of the United States Attorney, and the Grand Jury itself have each fully met the duties enjoined upon them by law.

By tradition, the proceedings of a Grand Jury are secret and the evidence considered by them is not a matter of public record. Two items, however, are the equivalent of items of public record in any homicide investigation and should be made public. Accordingly, the Court does append hereto the Certificate of Death of the Coroner of Montgomery County, Ohio, Exhibit 43, and the Complaint Memorandum of the Department of Police, Dayton, Ohio, Exhibit 17. All other exhibits will be held under seal for a period of one year and subject to disposition only by further Order of this Court.

Carl B. Rubin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

CASPER CARROLL GIBSON, Civil Action File No. 3-75-316

Plaintiff,

v.

REX DAVIS, DIRECTOR, Bureau of Alcohol, Tobacco and Firearms, Department of Treasury, et al., JUDGMENT

Defendant.

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that Plaintiff is hereby awarded the sum of Five Thousand Dollars ($5,000.00) as attorney fees.

Dated at Dayton, Ohio, this fourth day of January, 1976.

JOHN D. LYTER
Clerk of Court

BY: _____
Carole A. Makley, Deputy

Nos. 77-3067, 77-3068, 77-3184

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CASPER CARROLL GIBSON,,
Plaintiff-Appellant-Cross Appellee,

v.

REX DAVIS, Director, Bureau of Alcohol, Tobacco and Firearms, et al.,
Defendants-Appellees-Cross Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed November 17, 1978.

Before: PHILLIPS, Chief Judge, CECIL and PECK, Senior Circuit Judges.

CECIL: Senior Circuit Judge. These appeals are from orders of the United States District Court for the Southern District of Ohio, Western Division, by the appellant, Casper Carroll Gibson and the appellees, Rex Davis, Director, Bureau of Alcohol, Tobacco and Firearms and others.

Briefly, the facts giving rise to the litigation in the District Court are: On September 24, 1974, and prior thereto, the appellant and one Jerry D. Johnston were agents of the Bureau of Alcohol, Tobacco and Firearms and stationed at Dayton. On this date the two agents got into an argument and, without trying to detail the progress of it, Johnston discharged his gun and injured the appellant. The appellant then shot Johnston

and mortally wounded him. A federal grand jury investigated the incident but declined to return an indictment against the appellant.

As a result of this shooting incident, the sequence of events as affecting the appellant are as follows: On April 8, 1975, the appellant was first removed from his duties because of the killing of Johnston and the adverse publicity to the Bureau. On July 31, 1975, the Civil Service Commission found the removal fatally defective as lacking in specificity. The ATF was ordered to restore the appellant to his former position, grade and salary, retroactive to the date of his removal. The ATF, however, advised that the appellant would be removed from active duty upon return to his position. Under such circumstances the appellant chose to accept reinstatement but in the status of being on leave without pay.

On October 24, 1975, the appellant was again removed from his position in the ATF for the same reasons given in the first removal, in addition to the reason that appellant allegedly exhibited a lack of good judgment in continuing a hostile confrontation. On February 2, 1976, the Civil Service Commission again ordered that the appellant be restored to his former position, grade and salary. The ATF was given thirty (30) days to comply with the Commission's order, but did not restore appellant to active duty until March 8, 1976.

During the pendency of the Civil Service proceedings relative to appellant's second removal, the appellant herein filed his action on December 15, 1975, in the district court. In his complaint he sought reinstatement to active duty, full allowance of back pay, an order to the United States Postal Service enjoining it from withholding documents requested by the appellant under the Freedom of Information Act and an allowance of attorney's fees.

The district judge granted reinstatement to active duty with full back pay, denied that the appellant was entitled to any more documents under the Freedom of Information Act and allowed attorney's fees in the amount of $5,000.

The questions on the appeals challenge whether full back compensation has been paid, whether it was proper to allow attorney's fees to the appellant and whether the court erred in denying the appellant's request for documents under the Freedom of Information Act.

The appellant denies the government's claim that full back compensation has been paid. We have insufficient evidence in the record before us from which we can determine the amount of back pay due to the appellant to compensate him for all periods of time during which he was deprived of active duty status. We therefore remand the case to the district court to conduct a hearing and determine the amount of back pay due the appellant.

With reference to attorney's fees, the trial judge said:

> "The Court notes with concern ATF's recalcitrant conduct in this matter and defiance of orderly administrative procedures. Such conduct by an enforcement agency of the United States has implications far beyond the limits of this case. It may well be that it has reached the level of bad faith and vexaciousness (sic) justifying an award of attorney fees to the plaintiff. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, (1975); *U.S.* v. *Ford Motor Co.*, 522 F.2d 962, 967 (6th Cir. 1975); *Smoot* v. *Fox*, 353 F.2d 830, 832 (6th Cir. 1965). Accordingly, defendant is hereby ordered to show cause why reasonable attorney fees should not be awarded the plaintiff in this matter."

Subsequently, the court ordered the appellees to pay attorney's fees in the amount of $5,000. We conclude that in the absence of statutory authority attorney fees are not allowed against the government even though bad faith may have been involved.

We reverse.

Section 2412, Title 28, U.S.C. provides in part as follows:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this

> title *but not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action." (Emphasis supplied)

This statute then precludes the award of attorney's fees to a prevailing party in an action against the United States or any agency or official thereof, even though the prevailing party may recover his costs as provided in Section 1920, Title 28 U.S.C. Accordingly, attorney's fees may not be awarded to a prevailing party in such litigation even as costs since, as stated by this court,

> "• • • it seems basic that if a party is immune from an award of attorneys' fees as such, that immunity is not altered by taxing the fees as part of the costs. If the award is void in one form, it is void in the other." *Jordon* v. *Gilligan*, 500 F.2d 701, 705 (6th Cir. 1974); *cert. den.* 421 U.S. 991 (1975).

Appellant argues, however, that an exception to the statutory language should be made in this case in view of the district court's finding of vexatious, bad faith conduct on the part of defendants. It is true that federal courts, in the exercise of their equitable powers, may award attorney's fees when the interests of justice so require. *Hall* v. *Cole*, 412 U.S. 1, 4 (1973). More recently, the Supreme Court in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, at 258-259[1] (1975), noted that attorney's fees may be awarded by a federal court where "the losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons.'"

As stated by the court in *Rhode Island Com. on Energy* v. *General Services*, 561 F.2d 397, at 405 (1st Cir. 1977),

[1] P. 269, n. 44, "Although an award against the United States is foreclosed by 28 U.S.C. Section 2412 in the absence of other statutory authorization, • • •"

> "• • • the (Supreme) Court there was discussing (*Alyeska Pipeline Co.* v. *Wilderness Society*) in the context of an award of attorney's fees against a private party, the 'bad faith' exception to the 'American rule' that attorney's fees are not to be awarded to a prevailing party. The Court nowhere suggested that § 2412's prohibition of attorney's fees contained, by implication, a bad faith exception. Later in its opinion, the Court rejected the suggestion that a 'private attorney general' exception existed to § 2412 which 'on its face, and in light of its legislative history, generally bars such awards, which, if allowable at all, must be expressly provided for by statute . . . .'"

Appellant has not referred this court to any such authorizing statute nor has this court discovered any in its own research, which expressly provides for the award of attorney's fees in litigation such as is now before the court. As stated by the court in *Rhode Island Com. on Energy, supra,* at 405,

> "By its literal terms, § 2412 admits of no judicially fashioned 'bad faith' exception. Only exceptions 'specifically provided by statute' will subject the United States or its agencies to liability for attorney's fees."

Section 2412, being a limited waiver of soverign immunity, its

> "limitations and conditions • • • must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States,* 352 U.S. 270, 276 (1957).

We conclude that the district court erred in allowing attorney's fees against the United States.

One of the claims of the appellant is that the district court erred in not enjoining the Postal Service from withholding documents requested by him under the Freedom of Information Act.

In *Hawkes* v. *Internal Revenue Service,* 467 F.2d 787, at 791 (6th Cir. 1972), the Court quoted Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia as stating the purpose of the Act as follows:

> "The legislative history establishes that the primary purpose of the Freedom of Information Act was to increase the citizen's access to government records."

We examine the record of this case then, having in mind this legislative purpose.

With respect to appellant's request for documents of the United States Postal Service pursuant to the Freedom of Information Act, Title 5 U.S.C. § 522, the district judge ruled that the documents, unedited copies of which the court did not examine *in camera* were exempt from disclosure. The documents had been gathered by the Postal Service in connection with an investigation into a mail fraud scheme in which appellant alleged in his complaint other agents of the Bureau of Alcohol, Tobacco and Firearms had participated. Appellant alleged that although he expressed his belief that the scheme was unlawful to his superior at the Bureau, the Bureau took no action. Instead, according to appellant, the Bureau's concern about the complicity of some of its staff in the scheme becoming public knowledge was an "underlying reason" for the Bureau's dismissal of appellant. Hence, in addition to seeking reinstatement and back-pay in this action, appellant also requested disclosure, pursuant to the Freedom of Information Act, Title 5 U.S.C. § 552 of "copies of all documents, including statement and interview notes and memoranda, in connection with (the United States Postal Service) investigation into this chain letter scheme in violation of the mail fraud statute."

The district judge reasoned that the documents were exempt from disclosure pursuant to Title 5 U.S.C. § 552(b)(3) and Title 39 U.S.C. § 410(c)(6). Title 5 U.S.C. § 552(b)(3)

provides that disclosure of documents is not required if such documents are

> "• • • specifically exempted from disclosure by statute (other than section 552(b) of this Title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;"

The district judge reasoned further that the documents requested by appellant were specifically exempted from disclosure by Title 39 U.S.C. § 410(c)(6), which provides that the United States Postal Service's disclosure is not required of

> "• • • investigatory files, whether or not considered closed, compiled for law enforcement purposes except to the extent available by law to a party other than the Postal Service."

The district judge said,

> "The unqualified exemption of investigatory materials under 39 U.S.C. § 410(c)(6) is comparable to the exemption set forth in 5 U.S.C. § 552(b)(7) before it was narrowed by amendment in 1974. (Public L. 93-502, enacted November 21, 1974) Had Congress meant to narrow 39 U.S.C. § 410(c)(6) as well, it would have done so."

In support of his statutory interpretations, the district judge cited *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1972). While *Robertson* does reflect an expansive judicial interpretation of the phrase "specifically exempted from disclosure by statute" contained in Title 5 U.S.C. § 552(b)(3), that statute was subsequently amended by Pub.L. 94-409, enacted *September 13, 1976*, to set forth the conditions (A) and (B) which a statute must meet in order to be held to be one specifically exempting disclosure within the meaning of Title 5 U.S.C.

§ 552(b)(3). Although now in effect, the statute did not become effective until 180 days after its enactment and was, therefore, not in effect on *November 5, 1976* when the order now before this court was entered.

Yet, legislative history of the amendment makes it clear that Congress intended the amendment of § 552(b)(3)

> "• • • to *overrule* the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1972).
>
> • • •
>
> "Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute *establishing particular criteria or referring to particular types of information.*" H.R.Rep. No. 94-880, 94th Cong. 2d Sess. (1976), reprinted in 3 U.S. Cong. and Adm. News 2183, at 2204. (Emphasis supplied)

In addition, in the discussion of the amendment in the final Conference Report, it is stated,

> "The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson* 422 U.S. 255 (1975) • • •" H.R.Rep., No. 94-1441, 94th Cong., 2d Sess. (1976), reprinted in 3 U.S. Cong. and Adm. News 2244, at 2260.

It is clear then, as stated by the court in *Phillippi* v. *Central Intelligence Agency*, 546 F.2d 1009, at 1011-1012, fn. 4 (D.C. Cir. 1976),

> "This latest amendment (to Section 552(b)(3) shows plainly that Congress is determined that the exemptions to the FOIA should be interpreted narrowly."

The district judge's reliance upon *Robertson* in this case makes it apparent that the court decided appellant's claim on the basis of Title 5 U.S.C. § 552(b)(3) as in effect at the time

of the court's order. In view of authority cited herein, however, establishing the intent of Congress to overrule *Robertson* through amending that statute in a manner now in effect, remand of this action to the district court is necessary for that court to determine whether 39 U.S.C. § 410(c)(6) qualifies as an exempting statute within Title 5 U.S.C. § 552(b)(3), as amended.

No. 78-1167

In the Supreme Court of the United States

OCTOBER TERM, 1978

CASPER CARROLL GIBSON, PETITIONER

v.

REX DAVIS, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of the court of appeals' decision reversing the district court's order awarding him attorneys' fees. The district court's decision rested on a finding that respondents acted vexatiously and in bad faith.[1]

1. In 1974 petitioner, an agent of the Bureau of Alcohol, Tobacco and Firearms (the Bureau), became engaged in an altercation with a fellow agent (Pet. App. 1a-2a, 30a). Petitioner was wounded and the other agent was killed (Pet. App. 2a, 30a-31a). While petitioner was on disability leave following the injuries he suffered in

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[1]The court of appeals did not reach the government's contention that the district court's finding of bad faith was clearly erroneous, and that factual issue remains unresolved. We will not repeat the argument on that question here, but we have lodged with the Clerk of the Court a copy of the government's brief on appeal, which thoroughly addresses this point.

that incident, he was discharged by the Bureau for his allegedly improper conduct during the incident (Pet. 9; Pet. App. 2a, 31a). On July 31, 1975, the Federal Employee Appeals Authority of the Civil Service Commission (FEAA) concluded that petitioner must be reinstated because the notice of proposed removal had been insufficiently specific and had not included one of the reasons cited in the final Bureau decision ordering that petitioner be discharged (App. 18-24).[2]

Respondents filed affidavits in the district court (App. 52, 57-58) stating that officials of the Bureau then met with petitioner and informed him that he would be reinstated, although proceedings to discharge him would be renewed. The affidavits stated that the officials also pointed out that it might be to petitioner's advantage to remain on disability status, because his worker's compensation payments, unlike regular pay, would not be cut off pending administrative appeal of a discharge (App. 53, 58). Petitioner was reinstated on September 3, 1975 (App. 27), although he elected to remain on disability status, and the Bureau discharged him a second time in a final decision dated October 8, 1975 (App. 30-32).

In December 1975, while petitioner's second FEAA hearing was pending, he filed suit seeking reinstatement and back pay (see Pet. 10). Since the FEAA proceeding was going forward, no action was taken by the district court. In an opinion dated February 5, 1976, the FEAA reversed the Bureau's second order discharging petitioner, this time on the merits, and it again ordered petitioner's reinstatement (App. 28-36). On March 8, 1976, petitioner returned to work (Pet. App. 15a; App. 37, 55, 58, 63). A pay adjustment was necessary because petitioner elected to claim back pay for the period of his second discharge in lieu of the disability

[2]"App." refers to the Defendants' Appendix filed in the court of appeals.

payments he had received, and in October 1976 petitioner received a check for $738.50 to cover this amount (Pet. App. 15a). On October 26, 1976, petitioner retired on disability status because of emotional problems related to the shooting incident (App. 73-75).

Despite the fact that petitioner had been reinstated and subsequently retired on disability status, the district court held on November 5, 1976, that the Bureau had defied the FEAA by twice refusing to restore petitioner to its rolls (Pet. App. 1a-9a). The court ordered that petitioner be reinstated with back pay and ordered the Bureau to show cause why attorneys' fees should not be awarded to petitioner because of the government's bad faith behavior in failing to comply with the FEAA's orders.[3] After a hearing at which evidence was received concerning petitioner's claim that he had been harassed after his return to work, the district court ordered that respondents pay petitioner $5,000 in attorneys' fees (Pet. App. 10a-22a).

The court of appeals reversed (Pet. App. 30a-38a; 587 F. 2d 280), holding that whether or not bad faith is involved, 28 U.S.C. 2412 forbids the award of attorneys' fees against the United States in the absence of an express statutory authorization.[4] The court concluded that, because no such

[3]Petitioner also sought disclosure of certain documents of the Postal Service concerning his case. The district court denied disclosure (Pet. App. 5a-8a), but the court of appeals remanded because of an intervening change in the law (Pet. App. 34a-38a). This matter is not at issue in the present petition.

[4]28 U.S.C. 2412 provides in relevant part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

statute had been cited, and none could be located, the district court had erred in awarding petitioner attorneys' fees (Pet. App. 34a).[5]

2. The court of appeals' decision is correct, and it is in accord with a long line of cases holding that 28 U.S.C. 2412 forbids the award of attorneys' fees against the United States or its agencies and officers, unless a statute expressly authorizes award of attorneys' fees. See, *e.g., Rhode Island Committee on Energy* v. *GSA*, 561 F. 2d 397, 405 (1st Cir. 1977); *Fitzgerald* v. *CSC*, 554 F. 2d 1186 (D.C. Cir. 1977); *Natural Resources Defense Council, Inc.* v. *EPA*, 539 F. 2d 1068 (5th Cir. 1976); *Adams* v. *Carlson*, 521 F. 2d 168, 170-172 (7th Cir. 1975). Although the "American rule" against awarding attorneys' fees to the prevailing party does not apply in cases between non-federal parties when the losing party has acted in bad faith, see *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 257-260 (1975), there can be no non-statutory exception—for bad faith or any other grounds—to the rule established by Section 2412 when the United States is a party.[6]

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[5]The court of appeals remanded for calculation of the amount of back pay that might still be owed to petitioner (Pet. App. 32a). Petitioner does not here challenge that portion of the court of appeals' decision.

[6]The cases petitioner cites (Pet. 37-40) are inapposite. *Tenants and Owners In Opposition To Redevelopment* v. *HUD*, 406 F. Supp. 960 (N.D. Cal. 1975), appears to have involved only a motion for attorneys' fees against a non-federal co-defendant. See *id.* at 963. In any event no attorneys' fees were awarded, and the court did not mention Section 2412. In *Red School House, Inc.* v. *OEO*, 386 F. Supp. 1177 (D. Minn. 1974) (which was decided prior to *Alyeska*), the district court awarded attorneys' fees based in part on the "private attorney general" theory and in part on the conclusion that moneys in OEO's appropriations for attorneys' fees could be used for this purpose, and thus no funds would have to be paid out of the Treasury. In *Adams* v. *Carlson, supra*, the plaintiffs sought to strenghen their claim for attorneys' fees under the private attorney general rationale by alleging that the government officials had acted in bad faith. The court concluded that in light of the decision in *Alyeska* their claim could not be sustained and also noted that the record did not support the claim of bad faith. 521 F. 2d at 170.

Section 2412 is a specific expression of the settled rule that an order that would expend itself on the Treasury is permissible only if Congress has authorized such relief. See *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584 (1941). Petitioner has not identified any such authorization (and we know of none) for the payment of attorneys' fees in cases involving bad faith conduct by governmental agencies. The court of appeals therefore correctly reversed the district court's award of attorneys' fees.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

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